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STATUTE FORBIDDING TAKING ORDERS FOR INTOXICATING LIQUORS.

A problem for prohibition states is to get as much benefit from the Wilson act in furtherance of their policy as can be obtained.

The case of Heyman v. Southern Ry. Co., 203 U. S. 270, settled definitely the meaning of "arrival" under that clause of the act which provided that all intoxicating liquors "transported into any state or territory, or remaining therein for consumption, sale or storage therein, shall upon arrival in such state or territory, be subject to the laws of such state or territory, enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." It was there held that "arrival" did not mean either coming into the state, or reaching the point of destination therein, while still in the possession of the carrier, but it meant delivery to the consignee. Until such delivery liquor retained its character as an article of interstate commerce and was entitled to the same protection as other such articles, the effect of the Wilson act being, upon delivery, to strip it of that character.

The Georgia supreme court had ruled that the Wilson act merely protected liquor during transportation and state law attached *eo instanti* the carrier's liability changed to that of warehouseman. This ruling was reversed. Therefore no seizure could be legal until the liquor passed from the custody of the carrier.

Mr. Justice White explained, however, that the court was not deciding, that seizure could not be avoided if a liquor shipment were left with a carrier for an unreasonable time after it had reached its point of destination, as then it might be deemed to have been "constructively delivered." But it was settled, that prohibition laws could not get any aid from the Wilson act, if a consignee were willing to take all risk subsequent to carriage and delivery.

But another class of statutes is found in the laws of Kansas and South Dakota aimed directly at the entering into contracts within those states for the future purchase and sale of liquor to be shipped from other states.

The case of Delamater v. South Dakota, 205 U. S. 93, upholds the constitutionality of the South Dakota law, and the case of Crigler v. Shipler, 79 Kan. 834, holds that the Kansas statute is "within the principles of the Delamater decision, not obnoxious to the federal constitution." A later decision by the Kansas supreme court is more squarely in point as being governed by the Delamater decision than the Crigler case, as by that the statute was enforced in a criminal case against its offender. State v. Sherman, 107 Pac. 33.

The Crigler case and another civil suit, decided by the South Dakota supreme court subsequently to the decision of the Delamater case, we will consider when we have made further reference to the Delamater case. See Jones v. Yokum, 123 N. W. 272.

Justice White said in the course of his opinion in the Delamater case, that: "The business of soliciting proposals in South Dakota was one which that state had a right to regulate, wholly irrespective of when or where the proposals would be accepted or whence the liquor which they embraced was to be shipped."

We ascertain, then, that the state law forbidding the soliciting of orders in the state is the specific penal offense and not the acceptance of those orders outside, or shipment of liquor from the outside in pursuance thereto.

The case of Crigler v. Shipler was a suit by a traveling agent of a liquor house for

his commission on sales made upon orders solicited in Kansas and the court held him not entitled to recover, upon the familiar principle that plaintiff was suing for services rendered in criminal transactions. But did this principle apply? Merely soliciting orders for liquor was not what entitled to commissions, but commissions, if he was entitled to any, accrued upon sales made to those whose orders had been illegally solicited. The sales were legal, but the means of bringing about this lawful result were illegal. Therefore the services being illegally rendered, no recovery therefor can be claimed, a conclusion by the court seemingly sound.

But can the same thing be said of the conclusion of the South Dakota supreme court in the Yokum case? In that case it was allowed to be shown that the consideration of a note sued upon was liquor shipped f. o. b., Lexington, Ky., order for which was obtained by a traveling agent of plaintiff soliciting orders for liquor in contravention of the South Dakota statute. The ruling of the court was that the sale was illegal, because the non-resident plaintiff had not complied with the laws of South Dakota regulating the sale of intoxicating liquors at wholesale, saying "substantially all of the questions involved in this case are determined in" the Delamater case.

No stress is laid upon the fact that the note was procured upon an unlawful soliciting by the agent, but recovery is denied on the theory that the sale was made in South Dakota and no license had been taken out by plaintiff as a wholesaler.

But is it not evident, whatever the precedent matters to the shipment, that the liquor was sold in Kentucky, and not in South Dakota and as there made it was a valid sale? If a valid sale there, there would seem to be some question as to South Dakota courts lending their comity jurisdiction to enforcing the contract of sale, because the consideration of its making was something contrary to its public policy. But that there was a valid consideration, independent of comity, seems to us beyond any reasonable doubt.

It seems to us, also, that as the case was decided, there is a federal question presented, to-wit: That the South Dakota court has denied to a contract, valid under the interstate comferce clause, its legal enforcement. But whether the state courts could refuse to enforce it as being contrary to its public policy would present a federal question is much more doubtful. And even if the federal supreme court should hold, that enforcement should not be denied because of public policy, and that this denial presented a federal question, we do not see how its view might be made to prevail, if South Dakota were unwilling.

NOTES OF IMPORTANT DECISIONS.

CARRIERS—FAILURE TO DELIVER EXCUSED BY SEIZURE UNDER PROCESS ISSUING UNDER VOID STATUTE.—The Supreme Court of Georgia follows what appears to be a well settled rule of the federal supreme court, that seizure under process of goods in its possession by officers of the law does not render a carrier liable as for loss, though the process be based upon an unconstitutional statute. Southern Exp. Co. v. Gottlie Bros., 67 S. E. 414.

The rule has been thus stated by the late Justice Brewer: "The duty of the carrier to safely carry and promptly deliver to the consignee the goods intrusted to it does not require it to forcibly resist judicial proceedings in the courts of the state into or through which the goods are carried. While the carrier may appear and contest the validity of a seizure under judicial process of goods in its custody, if it reasonably notify the owner and call upon him to defend, it is relieved from further responsibility; and in the absence of fraud or connivance on its part, it may plead the judgment rendered against it as a bar in an action brought by the owner." American Exp. Co. v. Mullins, 212 U. S. 311.

The Mullins case, just as did the Georgia case, concerned a liquor shipment into a prohibition state, and it would certainly seem that such an interposition of force as a writ

in the hands of officers of the law ought to be deemed vis major excusing a common carrier.

It also would seem better that shippers, who thus seek to invade state policy, should stand the brunt and risk of loss rather than be allowed to shift such attacks upon those who, if they refused to accept articles offered for shipment, might incur liability at the point of shipment.

Many cases of a like tenor are cited in the opinion in the Georgia case.

NATIONAL BANKS—ERECTING BUILDINGS TO CONTAIN OFFICES FOR TENANTS.—The national banking act permits a national bank to hold only such real estate as shall be necessary for its immediate accommodation in the transaction of its business. It was claimed in a case lately decided by Fourth Circuit Court of Appeals that this limitation prevented a national bank from tearing down an old structure located on very valuable ground in a city and erecting thereon a building better adapted for the transaction of its business and for the purpose of enabling it to utilize advantageously its valuable location, and, thereby to lessen the expense of its own occupation, construct upper stories with offices to be let to tenants. Wingert v. First Nat. Bank, 175 Fed. 739.

A per curiam opinion adopted the opinion rendered by Morris, district judge, who followed the ruling in Brown v. Schleier, 118 Fed. 981, 55 C. C. A. 475, that: "If the land which a national bank purchases or leases for the accommodation of its business is very valuable, it may exercise the same rights that belong to other land-owners of improving it in a way that will yield the largest income, lessen its own rent and render that part of its funds which are invested in realty most productive."

The narrow rule that was contended for loses sight of the spirit of the prohibition. This prohibition was not meant to interfere in any way with a bank's establishing its business in whatsoever quarters its management should deem to its advantage in the conduct of its business. The opinion of Judge Morris in the Wingert case shows that the practice of national banks has been to pursue just the course that was objected to and departmental approval has been expressly given thereto.

We may well conceive that bank occupancy for its reasonable needs might constitute such an inconsiderable portion of floor space as to make its claim about investment in ground and building as legitimate employment of its funds untenable, but at least there ought to be reasonable latitude or discretion allowed as to this.

"THEORY OF THE CASE"—WRECKER OF LAW.

II.

In the preceding article, the position is advanced that the "theory of the case" doctrine is injuring the structure of the law. One difficulty in the way of an understanding of the baleful influence of this doctrine, is that we lawyers are trained to regard what is termed "adjective law" as of less importance than "substantive" law. We are taught that there is some material distinction between adjective and substantive law. Such an attempted distinction, it can be shown, is illusive. "Substantive law does not exist except as the result of "adjective" law given to enforce it. Change the adjective law and you change the substantive, necessarily. Repeal the "adjective" law and the substantive is gone.

Ubi jus ibi remedium.

A study of equity and its fundamental principles will show that rights and remedies are reciprocals, are interactions. It would lead away from the orient peaks of equity, and introduce confusion to attempt to reason from an arbitrary and crochety classification of substantive law here and adjective law there.

The case of Reigart v. Coal Co., 217 Mo. 142, is a very good example of how "adjective law" interweaves with "substantive," and how changes in the former create, modify or destroy the latter. The coal company had contracted in writing with Reigart to sell him such coal at certain rates as he should order during a specified time, at $1.75 per ton. But Reigart did not agree to order any coal, so, of course, there was no consideration expressed in the contract. Reigart sued for a breach of this contract, and endeavored to show, by oral evidence, that, as a matter of fact, there was a consideration.

Now, prior to this case, it was the holding of the Missouri Supreme Court that, notwithstanding the statute of frauds requires such contracts as Reigart's to be in writing, nevertheless, the consideration might be shown by evidence aliunde the writing itself. So that, under this interpretation by the court of an "adjective" rule of law, Reigart had a perfect "substantive" right, supported by a formidable array of cases. Bean v. Valle, 2 Mo. 126; Halsa v. Halsa, 8 Mo. 303; Ivory v. Murphy, 36 Mo. 534; O'Neill v. Crain, 67 Mo. 250; Ellis v. Bray, 79 Mo. 227.

By these decisions, Wain v. Warlters, Smith's Lead. Cas., 1. c. 335, 3 Hughes Gr. & Rud., was denied.

But the Reigart case overruled all these earlier Missouri cases—put the law back upon the English basis—Wain v. Warlters—by holding that the contract must itself show the consid-

eration, and Reigart's "substantive" right disappears.

Many illustrations might be given were there space. Take, for instance, situations like that developed in Texas & Pacific R. R. v. Humble, 181 U. S. 57, 45 L. Ed. 747, 4 Hughes' Gr. & R. 1047, where a married woman's "substantive" right to a recovery for a personal injury incurred in Arkansas, depends upon whether she is suing in Arkansas, where the husband need not be joined, or is suing across the border in Louisiana, where she has no "substantive" right unless she can reach it through an "adjective" law requiring her to join her husband.

Professor Henry S. Redfield, of Columbia College, takes the view that "the rock upon which the whole fabric of the law is in danger of going to pieces, is the lack of real knowledge on the part of practitioners of procedure." 25 Am. Bar. Ass'n Rep. 549; see, also, the address of Franklin W. Danaher, 34 Am. Bar Ass'n., (1910), 787.

In view of this intimate relation, this necessary interlacing of "adjective" and "substantive" law, is it not marvelous that so little attention is paid to procedure and practice in our prominent law schools? By procedure and practice is not meant the varying details of local or state codes and practice acts. Far from it. What is meant is that the student should be grounded in the great maxims of procedure like, "frustra probatur quod probatum non relevat." It is vain to prove what is not alleged, mentioned in the preceding paper. 70 Cent. L. J. 294. If maxims like this were understood, our reports would not be as they now are a series of unsolvable contradictions, one case recognizing under the "theory of the case rule," as "substantive" rights, everything that crops out in the evidence, whether embraced in the pleadings or not, and the next case refusing to recognize any right not set out in the pleadings.

A case illustrating what is conceived to be the true rule, under the maxim referred to, that the proof is limited by the pleadings, is Crockett v. Lee, 7 Wheat. (U. S.) 522, in which Chief Justice Marshall lays down the rule in these words:

(p. 526.) "The counsel for the appellant says it would be monstrous if, after the parties have gone to trial on the validity of the entry, and have directed all their (p. 527) testimony in the circuit court to that point, their rights should be made to depend in the appellate court on a mere defect in the pleadings, which had entirely escaped their observation in the court where it might have been amended, and the non-existence of which would not have varied the case."

"The hardships of a particular case would not justify this tribunal in frustrating the fundamental rules of a court of chancery; rules which have been established for ages, on the soundest and clearest principles of general util'ty. If the pleadings in the cause were to give no notice to the parties or to the court of the material facts on which the right asserted was to depend, no notice of the points to which the testimony was to be directed and to which it was to be limited; if a new case might be made out in proof differing from that stated in the pleadings, all will perceive the confusion and uncertainty which would attend legal proceedings, and the injustice which must frequently take place. The rule that the decree must conform to the allegations, as well as to the proofs of the parties, is not only one which justice requires, but one which necessity imposes on courts. We cannot dispense with this in this case."

Judge Marshall saw the state's interest in litigation, and he safeguarded it by applying the maxim, frustra probatur, etc., although he does not name it expressly. A maxim is nothing but one way of expressing a principle. Its essence is reason. Here the reason is that the state must have a permanent record of what was decided, for the use of the whole public, on questions of res adjudicata and collateral attack. Says Marshall: "Not only does justice require it, but necessity imposes it on courts." No need to quote "our statute." The court's inherent power is sufficient. Nowadays we make idols of "our statutes," and worship them as blindly as an Esquimo worships his totem pole.

Let us turn from Chief Justice Marshall to Judge Seymour D. Thompson, and see whether he perceives the interests of the state in procedure. We quote from his work on Trials:

"Section 2310. View That the Jury Should be Instructed Upon the Case Made by the Evidence, Although Variant from the Issues Made by the Pleadings.—This view ignores a principle which obtains in almost every situation in a civil trial, that the court is to disregard at every stage of the trial those errors or irregularities which it is competent for the party to waive, and which the party against whom they are committed does not object to at the time. The object of pleadings being merely to notify the opposite party of the ground of action or defense, if the party comes into court, it is not perceived why he may not waive the notice as in every other case, although the pleading may not advise him of the case or defense which is actually tendered in the evidence. Several of the best courts in the country proceed upon this enlightened view. The sound view is believed to be that the instructions have no conection with the plead-

ings, except through the evidence. The jury 'find from the evidence,' and not from the pleadings. The pleadings are intended to apprise the opposite party of the ground of action or defense, and to guide the court in admitting or rejecting evidence. The jury have nothing to do with them; are not permitted to take them to their room when they retire; and it is unprofessional for counsel to comment on them to the jury, nor should the judge permit it to be done. Suppose, then, that facts come out in the evidence broader than those alleged in the pleadings, or otherwise varying from them. Is the judge to instruct the jury upon the whole evidence, or is he to limit his instructions to so much of the evidence as is within the scope of the pleadings? The proper answer is believed to be this: If neither of the parties has objected to the evidence on the ground of variance, the judge is to instruct the jury upon the whole evidence; the rule being, that a variance between the pleadings and the evidence is no ground of error, unless the evidence was objected to on this ground at the time it was offered," etc., etc. See 4 Gr. & Rud. Title Variance.

Judge Thompson seems to have been the father of the "Theory of the Case." What Mansfield, Marshall, Kent, Story, Ellinborough and Shaw say cannot be done without wrecking the law, he advocates it apparently without a thought of consequences, merely in order to accommodate the parties by letting them thresh out everything that occurs to them at the trial. If this is not a reversion to patriarchal ways, what is it? It was not the Roman practice, and certainly it is neither English nor federal. It is "theory of the case," and that is all. See Theory of the Case, 4 Gr. & Rud.

Here are two examples of the Missouri situation, side by side:

"Jurisdiction may be defined to be the right to adjudicate concerning the subject matter in a grave case. To constitute this there are three essentials: First. The court must have cognizance of the class of cases to which the one adjudged belongs. Second. The proper parties must be present, and, third, the point decided must be in substance and effect, within the issue." Munday v. Vail, 34 N. J. Law, 422; l. c. 79, 3 Gr. & Rud.

"A court may be said to have jurisdiction of the subject matter of a suit when it has the right to proceed to determine the controversy or question in issue between the parties, or grant the relief prayed. What the controversy or issue, in any case, is, can only be determined from the pleadings. When the court has cognizance of the controversy, as it appears from the pleadings, and has the parties before it, then the judgment or order, which is authorized by the pleadings, however erroneous, irregular or informal it may be, is valid until set aside or reversed upon appeal or writ of error. This doctrine is founded upon reason and the 'soundest principles of public policy.' 'It is one,' says the court of Virginia, 'which has been adopted in the interest of the peace of society, and the permanent security of title.' Hope v. Blair (1891), 105 Mo. 85-97, 24 Am. St. 366-374n.

"But while this is unquestionably the law of this state, plaintiff invokes the rule of pleading that this defense of equitable estoppel is not open to defendant, for the reason that it is not pleaded. That an estoppel in pais should be pleaded in order to be available, is true. (Bray v. Marshall, 75 Mo. 327; Noble v. Blount, 77 Mo. 235.) But in Price v. Hallett, 138 Mo. l. c. 574, this court said: 'It seems to us this doctrine has peculiar weight when invoked against the admissibility of evidence when no issue of estoppel has been tendered in the pleadings or when an estoppel in pais is urged for the first time in this court, but where parties have permitted an issue of the kind to be raised by the evidence without objection, and have had full opportunity to try the issue we are unable to draw a distinction between such a case and those cases in this state in which parties have neglected to file replies, and this court has held that it was too late after trying the case as if a reply had been filed to claim that the answer was admitted.'

"An examination of the record will disclose that much of the testimony in regard to this license came from the plaintiff in the first instance and that no such objection as this was urged when the telegrams between Mr. Yoakum and Mr. L. B. Houck were offered in evidence; indeed, we find no objection of any kind in the abstract before us. With these telegrams in evidence and the proof that by the permission therein granted defendant entered and constructed its tracks (p. 487), we think the facts were before the court, whether formally pleaded or not, and it is too late now to raise the question of pleading for the first time."

The above quotations are given not as examples of a condition peculiar to Missouri; on the contrary, they represent the condition of the law in a majority of the states.

We take Illinois as another example. Fish v. Cleland, 33 Ill. 237-245 l. c. 12c, 3 Gr. & Rud., dismisses as unworthy of consideration probata that had no foundation in the allegata.

So, in Kenealy v. Glos, 241 Ill. 22-24, the court says: "There was therefore no issue of fact before the court to which the evidence was pertinent. This evidence being incompetent, it must be assumed that the court disregarded it." See, also, Thomas v. P., 170 Ill. 517-528, 47 Am. Rep. 458; Fletcher v. Root, 240 Ill. 429; Israel v. Reynolds, 11 Ill. 218. (See Lead. Cas. 83, 3 Gr. & Rud., where conflicting cases of Illinois are cited.)

Then turn to Devine v. Ry., 237 Ill. 278-284: cases, where it is held that going to trial without issues raised by the pleadings waives the issues. In other words, there has come a new dispensation, and now it is not necessary to have pleadings. They are old-fashioned, obsolete. See, also, Kelsey v. Lamb, 21 Ill. 559: cases; also, Balsewicz v. R. R., 240 Ill. 238, reviewed 70 Cent. Law Jour. 5, where in an action for personal injuries, although the defendant railroad had not pleaded a release, it was allowed to set it up at the trial, to the utter discomfiture of the plaintiff, father of the killed boy, because the release was signed by a fictitious administrator of the deceased youth, who had taken out papers in a court of probate that had neither territorial jurisdiction, nor was its order granting the letters of administration founded on fact. Other similar cases will be found under the title "Illinois," 2 Gr. & Rud.

From the foregoing cases of two great states, we have sought to indicate a conflict of opinion that is inimical to the due administration of law. From this it appears why it is that if one leaves his state, he leaves his profession behind, while at home it is a tangle of statutes and decisions through a thousand books constituting the "jungle" now referred to in the lay press.

If the condition in New York is "appalling" (34 Am. Bar Ass'n Rep. 787; see, also, the Corpus Juris Green Bag, 1910), what shall we call the condition in these states?

It is submitted whether these conclusions are not well founded:

Adjective law has a tremendous influence upon substantive law.

That ignorance of the maxims underlying adjective law, that is, procedure, leads to a most lamentable result in the destruction of our substantive law.

That the cure lies largely in a knowledge of the principles of procedure, which are made up of maxims that has always been, and must contnue to be, the law.

Now, can it be said that the case is a more reliable guide than is the maxim? *

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* If the condition in New York is "appalling" (34 Am. Bar Ass'n Rep. 787; see, also, the Corpus Juris Green Bag, 1910), what shall we call the condition in these states?

WITHOUT TENDER OF THE VALID PORTION, NO INJUNCTION WILL BE GRANTED RESTRAINING THE COLLECTION OF ILLEGAL TAXES.

There is a long line of decisions in the federal courts, and in many of the state courts, holding that equity will not enjoin the collection of taxes, claimed to be illegal, until the plaintiff has first paid or tendered the amount of taxes assessed against him, the legality of which he does not question.[1] This rule is based upon the maxim that "He who seeks equity must do equity," is a just and salutary rule and should be strictly enforced. The federal courts have thus enforced the rule, and in German National Bank v. Kimball,[2] the court makes clear its position in the following language: "We have announced more than once that it is the established rule of this court that no one can be permitted to go into a court of equity to enjoin the collection of a tax until he has shown himself entitled to the aid of the court by paying so much of the tax assessment against him as it can be plainly seen he ought to pay. That he should not be permitted, because his tax is in excess of what is just and lawful, to screen himself from paying any tax at all until

(1) German National Bank v. Kimball, 103 U. S. 732; State Railroad Tax Cases, 92 U. S. 575, 616; Northern Pacific R. Co. v. Clark, 153 U. S. 252; Albuquerque Board v. Perea, 147 U. S. 87; Odmin v. Woodruff, 23 L. R. A. 699; Bundy v. Summerland, 142 Ind. 92, 93; Board v. Daily, 115 Ind. 360, 362; Hewett v. Fenstamaker, 128 Ind. 315; Grand Rapids Ry. Co. v. City of Grand Rapids, 137 Mich. 587.

(2) 103 U. S. 732.

the precise amount which he ought to pay is ascertained by a court of equity. That the owner of property liable to taxation is bound to contribute his lawful share to the current expenses of government and can not throw that share on others while he engages in an expensive and protracted litigation to ascertain that the amount which he is assessed is or is not a few dollars more than it ought to be. But that before he asks this exact and scrupulous justice he must first do equity by paying so much as it is clear he ought to pay, and contest and delay only the remainder."

The bill in German National Bank v. Kimball sought to evade this rule by alleging that by reason of the absence of all uniformity in values, it was impossible for any person to compute or ascertain what the stockholders ought to pay on their shares of stock, but this evasion was not countenanced by the court, and the bill was dismissed for the failure to pay or tender the taxes due on the conceded value of the shares of stock. However, where the taxing officers have failed to keep such a record that the tax-payer could acquire the necessary information from which to determine the amount of the tender, the payment or tender of the taxes conceded to be due has been excused.[3] But even in this event the more equitable procedure would have been for the plaintiff to offer security sufficient to cover the amount likely to be found due. In Fargo v. Hart[4] such security was offered by the plaintiff.

If part payment of the taxes is not accepted, then a legal tender must be made of the amount of taxes conceded to be due. The tender must not be made on any condition prejudicial to the party to whom it is made, for, if not accepted, it is no tender. In Lynch v. Jennings,[5] the court, in speaking of conditional tenders, said: "When a strict and unconditional tender has been made and followed by an actual payment into court, the adverse party can take the money without impairing his right to prosecute his action. But when money is tendered upon a condition, the party to whom the tender is made is not entitled to the money until there has been a performance of the condition and where money is conditionally paid into court, the acceptance of the same is an admission that the party so paying is entitled to the relief prayed for."

Accordingly, a tender of an amount less than the entire tax, upon condition that the tender be accepted in full payment of the disputed tax, would not be a valid tender. It would place the tax collector in a position where he must either reject the tender entirely, or accept it as a full and complete discharge of all the taxes then payable. Whether such a sum is the correct amount, or less than the amount actually due, is a question for a court to decide, and the question can not be put to the tax collector for decision at his peril. Such a condition annexed to the tender is prejudicial to the party to whom made and renders the tender a nullity. The decisions are in accord that a tender of a part of the taxes, upon condition that the money be accepted in full for the entire tax, is not a valid tender.[6]

In State Railroad Tax Cases,[7] the United States Supreme Court thus held: "It is a profitable thing for corporations or individuals whose taxes are very large to obtain a preliminary injunction as to all their taxes, contest the case through several years' litigation, and when in the end it is found but a small part of the tax shall be permanently enjoined, submit to pay the balance. This is not equity. It is direct violation of the first principles of equity jurisdiction. It is not sufficient to say in the bill that they are ready and willing to pay whatever may be found due. They must pay what is conceded to be due, or what can be seen to be due on the face of the bill, or be shown by affidavits, whether conceded or not, before the preliminary injunction should be granted. The state is not to be

(3) Houghson v. Crane, 115 Cal. 304; First National Bank v. Covington, 103 Fed. 523.

(4) 193 U. S. 490, 502.

(5) 42 Ind. 276, 288.

(6) State Railroad Tax Cases, 92 U. S. 575, 616; Albuquerque Nat'l. Bank v. Perea, 147 U. S. 87, 90; City of Jeffersonville v. Louisville & Jeffersonville Bridge Co., 169 Ind. 641, 656.

(7) Supra.

thus tied up as to that of which there is no contest, by lumping it with that which is really contested. If the tax officer refuses to receive a part of the tax it must be tendered, *and tendered without the condition annexed of a receipt in full for all the taxes assessed.* We are satisfied that the observance of this principle would prevent the larger part of the suits for restraining collection of taxes which now come into the courts. We lay it down with unanimity as a rule to govern the courts of the United States in their action in such cases."

In the case of the City of Jeffersonville v. Louisville & Jeffersonville Bridge Co.,[8] recently decided in the Indiana Supreme Court, the plaintiff had tendered the portion of taxes conceded to be due as full payment of the entire tax assessed against it. The court, in passing on the sufficiency of this tender, held that it was the duty of the plaintiff "to make a tender of the amount of taxes which the complaint concedes to be equitably due, anl this tender should have been unconditional, to the end that the treasurer might receive it without being placed in the attitude, when making his defense, of having assumed an inconsistent position. Public interest, as well as equitable considerations, require the tender of that portion of the taxes which, on the theory on which the bill proceeds, confessedly ought to be paid." A temporary injunction was refused the Bridge Company by reason of its failure to make a legal tender of the taxes confessedly due.

While it is clearly the law that a taxpayer who seeks an injunction against the collection of a tax which is illegal only in part, must pay or tender the part which he concedes to be legal, this rule is not applicable when the entire tax is void, and in such event no tender is necessary.[9] As the term "void" has long been a much abused and wrongly-used term, it is interesting to note the limitations thrown around the word in this connection. The federal courts have given it a narrow construction. In People's National Bank v. Marye,[10] the United States Supreme Court at great length defined the limitations of the term "void," and said: "We are of opinion, however, that these assessments were not void within the meaning of the rule which absolves the taxpayer from the necessity of paying or tendering the amount equitably due from him. If there were no right to assess the particular thing at all, either because it is exempt from taxation, or because there is no law providing for the same, an assessment under such circumstances would be void, and, of course, no payment or tender of any amount would be necessary before seeking an injunction, because there could be no amount equitably due where there never had been a right to assess at all. Where, however, there is a statute which provides for an assessment and gives jurisdiction to the taxing officer, under some circumstances, to make one, but the particular assessment is invalid for want of notice to the taxpayer, or some other kindred objection, the equitable duty still rests upon him to pay what would be his fair proportion of the tax as compared with that laid upon other property before he can ask the aid of the chancellor to enjoin the collection of the balance. This is the equitable rule, and it is good morals as well. To say that the act under which the tax is levied is unconstitutional, and therefore is the same as no law, and hence there is no duty to pay anything, because no tax can be levied without some law therefor, is to state the proposition too broadly. We concede that if the law were unconstitutional because, for instance, there is no constitutional power to tax the particular property, there is no necessity to pay anything. But where some part of the law may be unconstitutional because of a failure to comply with some matter of detail, but the amount which the owner of the property ought to pay is perfectly clear under the provisions of law, then if the taxpayer desire to be exempted from paying more than his share, he must pay or offer to pay his proportion before equity will aid

(8) Supra.

(9) Fargo v. Hart, 193 U. S. 490, 502; People's Nat'l. Bank v. Marye, 191 U. S. 272, 281.

(10) 191 U. S. 272, 281.

him in his effort to escape paying a disproportionate share. The statute herein provides for a tax and creates the equitable obligation to pay some amount by reason of the same, and even though there may be some obstacle which prevents its entire legality, yet the person assessed should recognize his equitable obligation to pay the tax to the extent stated before he can base any claim for assistance of equity to get rid of the balance of the tax. * * * So, when he comes into a court of equity to ask its aid, should it appear, on his own statement or otherwise, that if all the claims he makes were allowed, he would still equitably owe the government a certain sum by reason of the statute providing for the assessment and his ownership of the property assessed, will he be heard to insist that the court grant him an injunction preventing the collection of any tax, because he had no notice of the assessment? He owes something to the government as a tax upon his shares, and ought any court of equity to aid him in escaping all obligation because, while insisting that the whole assessment is illegal, it yet clearly appears that a portion thereof, even if uncollectible, is nevertheless equitably and justly due? *Is the equitable obligation arising by reason of these statutes, and under these circumstances, to pay some tax, completely obliterated because the particular tax cannot be legally collected, and may be called void? We think clearly not.* This same reason applies not only to a lack of notice, but also to the case of a claim that the tax is illegal because it did not allow deductions which by the federal statute should have been allowed. The tax under such circumstances is not void, but at most, voidable for the illegal amount."

So much confusion has arisen in all branches of law in distinguishing between "void" and "voidable," that it is not surprising that in this connection the term "void" should in some instances be given too broad a meaning. There are a few decisions and dictums which apparently do not recognize the narrow rule laid down in People's National Bank v. Marye, but with few exceptions, a careful scrutiny of the facts will reveal that the tax was more than "irregular" or "illegal;" that the tax was in fact void, for the reason that the property was either exempt from taxation, or because there was no law making the particular property liable to taxation. Yocum v. First National Bank,[11] is apparently an exception to the rule announced in People's National Bank v. Marye. In this case the capital stock of the plaintiff had been assessed, and afterward an increase of $16,000.00 was added to the assessment at a time when it was contended the taxing board was not legally in session. It was not claimed that the stock was exempt from taxation or that the assessment would have been illegal if made at a time when the board could lawfully act on the assessment. An action was brought to enjoin the entering of the $16,000.00 increase on the tax duplicate, but no tender was made of any part of the taxes. The court held: "If the complaint were to enjoin the collection of taxes, part of which were legal and part illegal, the complainant would be required to pay or tender payment of the legal portion, and this averment would be necessary before injunctive relief would be granted; but that is not this case, nor is this case within the principle or rule which requires such averment to be made. This action is to set aside a particular order alleged to be void, whereby a specific sum, to-wit: $16,000.00 it is averred was illegally added to the assessed value of appellee's property. The relief sought is confined exclusively to this assessment, which is alleged to be void, and wherever this is the case, this court and other courts have held that the averment of payment or tender of payment of the legal taxes need not be made." While the reason here advanced is in conflict with the doctrine of People's National Bank v. Marye, the result reached is in harmony with that decision, for the Indiana court could have reached the same conclusion on the ground that the legal portion of the taxes was in substance and effect paid or tendered, for the plaintiff in Yocum v. First National Bank did not attempt to

(11) 144 Ind. 272, 276.

enjoin or tie up the collection of the entire tax, but sought only to enjoin the $16,000.00 increase, alleged to be void. The action as thus instituted in no way interfered with the collection of the legal portion of the tax and was equivalent to payment or tender of the portion conceded to be due, inasmuch as the tax collecting officer had untrammeled power to collect the legal portion in the usual manner. Had the situation been such as to require enjoining the collection of the entire tax in order to reach the illegal portion, then the case would have come within the reason of the rule requiring tender. However, in City of Jeffersonville v. Louisville & Jeffersonville Bridge Co.,[12] wherein the plaintiff sought to enjoin the collection of taxes denominated *void* on account of the assessment having been made by a taxing board alleged to have no jurisdiction to assess the particular property at all, the Indiana Supreme Court nevertheless required an unconditional tender of the amount conceded to be due, and refused a temporary injunction because of the failure to make such a tender. While the case neither expressly overrules or distinguishes Yocum v. First National Bank, the decision is in harmony with People's National Bank v. Marye.

In Cummings v. Merchants National Bank,[13] where the question was whether the rule adopted by the local boards of assessment was in conflict with the state constitution, the court held that it was, and that an assessment made under those circumstances was illegal, but that, nevertheless, the taxpayer was bound to pay the amount equitably due.

In order to give a court of equity jurisdiction, such payments or tender must be properly set up by averments in the complaint or petition, for an injunction will not lie to prevent the collection of taxes, a portion of which are conceded to be legally assessed, without an allegation in the complaint that the plaintiff has paid so much of the assessment as is lawfully due; or, an averment that he has tendered the same to the tax collector, and that he keeps the tender good by bringing the money into court for his benefit.[14]

Briefly, then, the law, as laid down by the United States Supreme Court, and followed almost unanimously by the decisions of the various state courts, is this: No one will be permitted to go into a court of equity to enjoin the collection of a tax until he has shown himself entitled to the aid of the court by paying, or tendering, so much of the tax assessed against him, as it can be plainly seen he ought to pay. The tender must be without the condition annexed of a receipt in full for all the taxes assessed and must be pleaded by proper averments. No tender of a void tax is necessary, but the unconstitutionality of the taxing law will not render the assessment such a void tax as can be enjoined without tender, unless there is a showing that the property is exempt from taxation, or that there is no law making the property liable to taxation.

WILMER T. FOX.

Jeffersonville, Indiana.

(12) 169 Ind. 645, 656.

(13) 101 U. S. 153.

(14) Morrison v. Jacoby, 114 Ind. 84, 93; Hewett v. Fenstamaker, 128 Ind. 315.

EMINENT DOMAIN—SHADE TREES.

McEACHIN v. MAYOR, ETC., OF CITY OF TUSCALOOSA.

Supreme Court of Alabama, December 16, 1909.

Const. 1901, sec. 235 (Const. 1875, art 14, sec. 7), requiring municipal or other corporations and individuals, taking property for public use, to make just compensation for property taken, injured, or destroyed by the construction or enlargement of its works, highways, or improvements, gives one whose property is injured by improvements, etc., made under power of eminent domain, a right of action for resulting damage, irrespective of whether the fee of the property is in plaintiff or the taker, so that, if the removal of shade trees on the edge of a sidewalk in the improvement of the street by a city affected the value or enjoyment of the abutting property, the owner of such property would have a right of action against the city for damages, though he was not the owner of the trees and his right of ingress was not affected thereby.

ANDERSON, J.: Section 235 of the Constitution of 1901 (section 7, art. 14, of the Constitution of 1875) provides that "municipal and

other corporations and individuals invested with the privilege of taking property for public use, shall make just compensation, to be ascertained as may be provided by law, for the property taken, injured or destroyed by the construction or enlargement of its work, highways or improvements," etc. The language used is plain and unambiguous, and requires compensation to the owner, not only for the property taken or destroyed, but for property injured, as the result of the construction or enlargement of the works, highways, or improvements. If injury is done to another's property by a corporation or individual invested with the privilege or exercise of the right of eminent domain, whether in acquiring the property for public use or in the enlargement or improvement of the property already acquired, the owner of the adjoining injured property is given a right of action, under our constitution, notwithstanding he has no such right under the law as it existed previous to the constitution of 1875. And it matters not whether the fee in the works or highway is in the offending municipality or the plaintiff. The plaintiff's right of action is not dependent on an ownership of the street, or of the earth removed or trees destroyed; but if her property was injured by the destruction of the trees, by the defendant, in and about the enlargement or improvement of the street, she is entitled to just compensation, under the very letter of the constitution. Nor does it make any difference whether the improvements made by the city did or did not exceed the existing necessities. City of Montgomery v. Maddox, 89 Ala. 181, 7 South. 433. It is true, in the Townsend case, reported in 80 Ala. 489, 2 South. 155, 60 Am. Rep. 112, and in 84 Ala. 478, 4 South. 780, this clause of our constitution received a more limited or restricted construction than is now given it; but said case was qualified by the Maddox case, supra, which we think is in line with the present holding. It is true the Maddox case was decided by an equally divided court; but the opinion of Justice Somerville, which was concurred in by Justice McClellan, was subsequently adopted and approved by this court in the case of Avondale v. McFarland, 101 Ala. 381, 13 South. 504, and the Townsend case was overruled.

We would make no war upon the opinion of Justice Sayre, as concurred in by the Chief Justice, if section 235 of the constitution did not exist, as it is a clear enunciation of the rule under the common law; but we do think it does not properly apply the terms of the present constitution to the facts in the case at bar, and that the distinction attempted between excavating and removing dirt from a street in front of a lot and in cutting down and removing shade trees from the sidewalk is without a difference. This court has held that an abutting owner is entitled to any injury to the value of his property, caused by the lowering of the street or sidewalk, and not due solely to the destruction or impairment of his right of ingress and egress to and from his home; for as was said by Justice Somerville in the Maddox case, supra, in discussing the influence of our constitution: "If the contiguous proprietor of a house and lot is injured, in the sense of being damaged, by the grading of the street, * * * and by reason of this improvement the pecuniary value of such property is diminished, the owner is entitled to be compensated for the damage he has sustained." If a house is denuded of the shade trees in front of same, and it is thereby made less comfortable, or its beauty is impaired, so as to affect its use and enjoyment, and thereby render it less valuable, we see no reason why the owner would not be entitled to recover the damages sustained, whether his right of ingress and egress is affected or not. The question is: Was the pecuniary value of the property injured, as a result of the action of the defendant in the improvement or enlargement of its street? If it was, the plaintiff has a cause of action, and the amount of her recovery would be the difference in the value of her property before and after the improvement or enlargement of the street.

Nor do I think the authorities relied upon in the minority opinion in conflict with the holding in this case. They are inapt, as they were decided either under the common law or in states with no constitutional provision like ours. Indeed, as was said in the Maddox case, supra: "I do not discover precisely the same language in the constitution of any other state, except those of Alabama and Pennsylvania." Therefore, decisions on the subject in jurisdictions other than Alabama and Pennsylvania are of little value in dealing with the construction of this section of our own constitution, and, while there may have been some wabbling by the courts of these two states on this important subject, the more recent decisions of each of said states favor a liberal construction of this clause in favor of the property owner. "It is generally conceded that provisions of this character are remedial in nature, giving damages where none before were allowed, and that therefore they should be liberally construed to effect their object." Maddox case, supra. Indeed, I think there is an expression on page 230 of 109 Ala., and page 1 of 19 South. (31 L. R. A. 193, 55 Am. St. Rep. 930), in the Francis case, while not decisive of said case, that was intended as a warning signal against this court's falling into what

I consider the error of the minority. The court there emphasized the fact that it did not mean to hold that a city would be absolved from liability for cutting trees. True, it was qualified by the rule as to necessity; but the writer evidently overlooked the fact that this made no difference under the Maddox case.

It is needless to discuss the assignments of error in detail, as it is sufficient to say that the trial court proceeded under a misconception of the plaintiff's constitutional rights, and the judgment is reversed and the cause is remanded, in order that the issue may be tried under the rule we have attempted to lay down in this opinion.

Reversed and remanded.

NOTE.—*Destruction of Shade Trees by a City in Street Improvement.*—It may be conceded that the constitutional clause quoted in the opinion in the principal case extends the rule under the common law, but to our mind this does not save the conclusion reached therein from being a very extraordinary decision. It resembles somewhat late holdings by the federal supreme court, to which three members of that court dissented, that the denial of further comity, according to former conditions, to a foreign corporation, may amount to a denial of the equal rights guaranteed by the Fourteenth Amendment. Southern Ry. Co. v. Greene, 30 Sup. Ct. 287.

The principal opinion concedes that a street may be opened and, necessarily, that trees left standing there may be removed. Necessarily, further it concedes it may be opened to its full width, but, if this is not done, such trees as are left remain by leave or license of a municipality. Therefore, the ruling is, in effect, to say that where the original non-exercise of a city's right to remove a shade tree has resulted in pecuniary benefit to abutting property, the subsequent exercise of that original right has become conditioned. It seems to us remarkable that the forceful method adopted by Judge Sayre, with whom concurred the Chief Justice, to show that here was a plain case of *damnum absque injuria* did not impress itself upon the majority. The ultimate analysis of this ruling is, that a municipality cannot remove an obstruction in a street, if an abutter is interested pecuniarily in its remaining there, without making compensation therefor.

In City of Atlanta v. Halliday, 96 Ga. 546, 23 S. E. 509, it was ruled that, where the public owns the fee of the street, the municipality may remove obstructions at discretion, and the abutter has no right of action therefor. And even where the abutter's title extends to the center of the street, he merely has the right, as owner of the trees thereon, only to use them in such way as not to interfere with the right of the public to use and improve the street for travel. Glencoe v. Reed, 93 Minn. 518, 101 N. W. 956, 67 L. R. A. 901; Bigelow v. Whitcomb, 72 N. H. 472, 57 Atl. 680, 65 L. R. A. 676.

We have supposed heretofore, that about the only serious question on the subject of the right of abutting owner to damages for injury or destruction of shade trees were in those cases where telegraph or telephone companies or some third person injured or destroyed them, though having a permit by a city Thus in Cartwright v. Liberty Telephone Co., 205 Mo. 126, 103 S. W. 982, 12 L. R. A. (N. S.) 1125, in the opinion by Woodson, J., it is said. "It (the company) contends that the erection and maintenance of telephones are a proper use of a street. The owner of the adjoining premises cannot claim damages resulting thereto from user of a street; and cite the following authorities in support of that contention (giving a long list of Missouri cases). We do not understand that the respondents controvert the rule above contended for in a proper case." Then the court shows it is on the side of the contention that a city could authorize a telephone company to use the trees on a street without it becoming liable to an abutter for damages. As the telephone company had not obtained a permit it was deemed a trespasser and liable to the abutter for damages. The opinion also says: "According to the laws of this state, the property owner in cities, towns and villages own the land to the center of the adjoining street, subject to the easement of the city. It has the right to subject the street to any and all the uses or purposes for which the street was acquired; but, until it does so subject it to one or more of those uses, or so long as he and the city can jointly occupy and use the street without doing 'violence to the full free and complete exercise of the public easement,' he is to that extent just as much the owner of the property to the center of the street as he is of the remainder of the lot, and has the same right to use it in any manner and for any purpose he may see proper, not inconsistent with the rights of the public."

In Bronson v. Albion Teleph. Co., 67 Neb. 119, 93 N. W. 201, 60 L. R. A. 426, it was held that the question of the liability of a telephone company for the removal or destruction of trees necessary in the construction of its line depended upon whether the use of a highway for poles and wires was contemplated in a highway dedicated or condemned or was a new and additional burden. If the latter, the abutting owner is entitled to compensation. "We apprehend there cannot be any question about a city having power to remove an obstruction in a street, whether it be tree or anything else, and whether it be on the side or center of a street."

It is conceded, however, that courts have held, that a city has not unlimited discretion to remove valuable shade trees. There must be some reasonable necessity therefor. See City of Atlanta v. Holliday, *supra;* Frostburg v. Wineland, 98 Md. 239, 56 Atl. 811, 103 Am. St. Rep. 390, 64 L. R. A. 627; Stretch v. Cassopolis, 125 Mich. 167, 84 N. W. 51, 84 Am. St. Rep. 51, 51 L. R. A. 345.

Thus the Frostburg case held, in an injunction case, that trees which had been standing for forty years without impeding the travel on a public highway could not be removed, where in a proposed plan for the improvement of the highway with a slight circular turning of the curb water could be carried in the gutter around the trees, its flow not being interfered with, nor the improvement of the street in a workmanlike manner. The court said: "The best adjudicated cases hold that shade trees in a highway are not a nuisance *per se*, and only become so when they obstruct or interfere with the use of the highway

or street." How the right of a municipality can be deemed paramount in the free, unobstructed use of a street, and removal of a shade tree that is an obstruction not be *damnum absque injuria* is to us incomprehensible. C.

JETSAM AND FLOTSAM.

IT IS SOMEBODY'S MOVE.

The following editorial in Scrips McRea League papers has been printed in over two hundred leading dailies of America:

"Within the past month some half million or more American citizens have read a terrible story that has been printed about Judge Peter S. Grosscup of the United States Circuit Court. The story, which has been printed in installments, marshals an array of charges ranging all the way from nasty village gossip and scandal to documents (hitherto unpublished) from the files of the government at Washington.

"These charges, involving, as they do, misconduct as a man and misconduct as a judge, are either true or they are false. Judge Grosscup, so far as can be learned, has taken no steps in the matter. The government at Washington has done nothing. The United States district attorney and the federal grand jury seem to have done nothing.

"It is not sufficient to say that these publications have been made by a Socialist newspaper. The point is that these things have been published broadcast, and are rapidly becoming matters of common discussion. We believe in freedom of the press, and the best way to secure that freedom is to punish abuses of it. If the socialist newspaper has not told the truth, if it has libeled the United States judge, then it should be dealt with according to law.

"But if all hands sit silent, then it is the judge himself and the proper government officials who will be more guilty than the socialist editor of bringing contempt upon the courts. For unless the stories can be disproved and the writer punished, Grosscup ought not to sit another hour upon the federal bench."

BOOK REVIEWS.

AMERICAN ELECTRICAL CASES, VOL. IV., WITH ANNOTATIONS.

This volume runs from 1904 to 1908, inclusive. The cases reported refer to the official and west system, with volume and page. Practically every case carries an annotation at the bottom of the pages, some of the annotations being monographs of extensive treatment. This volume is a book of nearly 1,200 pages, and thus some idea is conveyed of the prominence of this class of cases, putting it in a class like railway cases, to which reports are especially devoted.

The indexing of reports like these shows their importance and how questions relating to electricity may be more easily run down. For example, we find in the index to this volume such headings as "Attractive Nuisances," "Belt," "Conduits," "Crossing of Wires," "Electrolysis," "Guard Wires," "Insulation," etc.

The volume is in law buckram, of typographical excellence, and issued from the publishing house of Matthew Bender & Co., Albany, N. Y., 1910.

BOOKS RECEIVED.

A Student's Text on the Law of Principal and Agent. By Sherman Steele, Lecturer on Agency in St. Louis University School of Law. Chicago. T. H. Flood & Co. 1909. Review will follow.

The Corporation Manual. Statutory provisions Relating to the organization, management, regulation and taxation of domestic business corporations, and to the admission, regulation and taxation of foreign corporations in the several states and territories of the United States, arranged under a uniform classification, corporation laws of Alaska, Philippine Islands and Porto Rico, federal statutes affecting business corporations, and digest of business corporation laws of Mexico. And cyclopedia of corporation forms and precedents. Edited by John S. Parker, of the New York bar. Sixteenth edition. Corporation Manual Company, 34 Nassau street, New York. 1910. Review will follow.

Municipal Franchises. A description of the terms and conditions upon which private corporations enjoy specal privileges in the streets of American cities. By Delos F. Wilcox, Ph.D., Chief of the Bureau of Franchises of the Public Service Commission for the First District of New York. In two volumes. Vol. I. Introductory—Pipe and Wire Franchises. Rochester, N. Y. The Gervaise Press. Distributing sales Agents, Engineering News Book Department. New York. 1910. Review will follow.

HUMOR OF THE LAW.

WANTED HER DIVORCE.

The following letter was received by an Oklahoma attorney:

August the 23 1909.
———— Oklo.

Mr k dear Sire

i Will rite you a feW lines to See if you are Still giten my devorse are not i want my devorse this SePtemBer Cort Be Shure and git it and When yu Want me to Come yu can let me now i Want the devorse shure yu rite me a Card as quick as yu git this letter So i Will now from Miss M——— B———.

i saw the nams in the Paper But mine and diden now what to due and yu rite me a Card So i will now rite now

to Mr. Jug (Judge) k.

Prisoner—Your Honor, I consider this a free country, and therefore I should not have been arrested for being in a free fight.

Judge—Your point is well taken, but this is also a fine country. If it permitted fights it wouldn't be fine. Therefore we shall omit the free and consider the fine. Ten dollars and costs.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. **Adverse Possession**—Evidence.—Occupation of land by tenant for a few years, the occasional cutting of small timber for mine props, and the taking of tan bark therefrom, together with the payment of the taxes, held insufficient to establish title by adverse possession.—Mahoning Coal Co. v. Dowling, Ky., 124 S. W. 370.

2. **Attorney and Client**—Nature of Relation.—The relation between attorney and client rests upon essentially the same basis of trust and confidence as the relation between tenants in common.—Hill v. Coburn, Me., 75 Atl. 67.

3. **Bailment**—Conversion.—A bailee, charged with conversion, cannot defend refusal to deliver the property to plaintiff because others claimed it, where he did not deliver the property to anyone.—Riddle v. Blair, Ala., 51 So. 14.

4. **Bankruptcy**—Discharge.—Confirmation of a compromise by the bankruptcy court works a discharge by operation of law, and bars all remedies for the enforcement of claims.—Hurner v. Hudson, Me., 75 Atl. 45.

5. **Banks and Banking**—Insolvency.—An insolvent bank, known to be so by its officers, is a trustee ex maleficio of the deposits received.—Furber v Dane, Mass., 90 N. E. 859.

6.——National Banks.—In an action by a national bank on a loan, evidence of statements by defendant to plaintiff regarding the ownership of land held admissible on the question of notice, though under the provisions of the banking act a national bank may not loan money on real estate security given directly to the banks.—National Bank of North America in New York v. Thomas, R. I., 74 Atl. 1092.

7.——Payment of Check Improperly Signed.—A bank having paid the check of a company signed only by its president, when by agreement of the bank and company its checks were also to be countersigned by another officer, held the bank was liable for the amount to the company's receiver.—Ellis v. Wetern Nat. Bank, Ky., 124 S. W. 334.

8. **Bills and Notes**—Execution.—The payee of an instrument in the form of a note could not sign the maker's name thereto and make his mark; the maker touching the pen staff.—Penton v. Williams, Ala., 51 So. 35.

9. **Boundaries**—Footsteps of Surveyor.—Where footsteps of a surveyor are found and identified, they must control, and all classes of calls must yield to them.—Taft v. Ward, Tex., 124 S. W. 437.

10. **Brokers**—Contracts.—Where a contract employed a broker to purchase timber options for a percentage of the profits, he was not entitled to a percentage of the profits derived from a sale of the land necessarily purchased in order to obtain the timber thereon.—Wilson v. James, Wash., 106 Pac. 619.

11. **Carriers**—Personal Baggage.—A carrier receiving a trunk for carriage by freight without notice that it contains money held liable for the larceny of money by an agent of the carrier in whose immediate care the trunk is placed.—Chesapeake & O. Ry. Co. v. Hall, Ky., 124 S. W. 372.

12.——Rate for Switching Cars.—A rate for switching cars which has been continued in force a considerable time is presumed reasonable and remunerative.—Northern Pac. Ry. Co. v. Railroad Commission of Washington, Wash., 106 Pac. 611.

13.——Refusal to Sell Ticket.—A carrier's refusal to sell tickets for a flag station established by the railroad commission held tortious, for which general or special damages may be recovered.—Georgia R. & Banking Co. v. Greer, Ga., 66 S. E. 961.

14. **Contracts**—Abandonment.—Where a party contracted to build a vessel for plaintiffs, but abandoned the contract because of lack of funds, and plaintiffs completed it themselves, the fact that the contractor voluntarily and without compensation remained on the job as overseer did not constitute a new contract superseding the former one.—Russell v. Ross, Cal., 106 Pac. 583.

15.——Building Contracts.—If, under a building contract requiring the work to be done to the satisfaction of the owner, the owner fails to be satisfied with that which ought to satisfy him, there may be a recovery on a quantum meruit.—Handy v. Bliss, Mass., 90 N. E. 864.

16.——Express and Implied Terms.—The express mention in a contract of what would be otherwise fairly implied cannot change its nature, nor the rights of the parties.—Fosburgh Co. v. Hampden County, Mass., 90 N. E. 851.

17.——Implied Contract.—A party leasing premises for saloon purposes cannot recover damages from the owner because he is unable to continue his business through the refusal of the owner to sign his petition for a license.—Lansdowne v. Reihmann, Ky., 124 S. W. 353.

18.——Validity.—A contract to pay a certain sum held not rendered void by the further agreement to make payments from profits of a bucket shop till such sum is paid.—Williams Commission Co.'s Assignee v. W. A. Shirley & Bro., Ky., 124 S. W. 327.

19. **Corporations**—Apparent Authority of Officers.—A particular course of business by a corporation through its president may create apparent authority to do acts which in point of

fact the officer had been inhibited from doing by the directors.—Tyler Estate v. Hoffman, Mo., 124 S. W. 535.

20.——Purposes.—Rev. St. 1895, art. 642, subd. 14, while authorizing the formation of a corporation for a business consisting of manufacturing and mining, held not to authorize the formation of such corporation for two businesses—one of manufacturing and the other of mining.—Johnson v. Townsend, Tex., 124 S. W. 417.

21.——Transfer of Stock Certificate.—A bona fide transferee of a stock certificate is entitled to recognition by the corporation without litigating his title with a third person claiming under a certificate previously surrendered.—State ex rel. Louisiana State Bank of Baton Rouge, La., 51 So. 95.

22. **Criminal Evidence**—Admission by Counsel.—Silence of one accused at a judicial hearing is not an implied admission of the truth of statements made in his presence; but in a criminal prosecution admission of fact made at the trial in open court by the accused or his counsel may be considered by the jury.—Godwin v. State, Del., 74 Atl. 1101.

23.——Insanity.—Where there is evidence of personal manifestations of the insanity of accused, proof of hereditary tendency held admissible as supporting such evidence.—People v. Gambacorta, N. Y., 90 N. E. 809.

24. **Criminal Law**—Weight of Evidence.—In a prosecution for larceny, the jury could believe the evidence of the prosecution, though very weak, and reject accused's statement that he took the property under a bona fide claim of right.—Thomas v. State, Ga., 66 S. E. 964.

25.——Continuance.—The refusal of a continuance for the absence of a nonresident witness could not be sustained because there was no certainty that his presence could be obtained at any term of court, since Cr. Code Prac. sec. 153, authorizes a defendant to take depositions of a nonresident witness.—Settle v. Commonwealth, Ky., 124 S. W. 393.

26.——Jurisdiction.—Where a court of general jurisdiction exercises special jurisdiction and adopts procedure in derogation of the common law practice, jurisdictional facts must be averred and proved.—Godwin v. State, Del., 74 Atl. 1101.

27.——Maintaining Liquor Nuisance.—In a prosecution for maintaining a liquor nuisance, prior convictions of accused for maintaining a liquor nuisance in another place are not admissible to show his intent.—State v. Bartley, Me., 74 Atl. 1129.

28. **Damages**—Measure of Damages.—The measure of damages for the breach by the vendee of the contract for the purchase of land is the difference between the contract price and the market value of the land on the day the sale was to have been completed.—Norris v. Letchworth, Mo., 124 S. W. 559.

29. **Deeds**—Construction.—A clause in the description in a deed cannot be disregarded, although in conflict with other clauses, where the other clauses do not describe the land with such definiteness that there can be no doubt as to the land meant.—Chattahoochie & G. R. Co. v. Pilcher, Ala., 51 So. 11.

30. **Easements**—Extinguishment.—An easement acquired by prescription is extinguished when the land is taken for public uses under the right of eminent domain.—Currie v. Bangor & A. R. Co., Me., 75 Atl. 51.

31. **Ejectment**—Pleadings.—Where plaintiffs suing to recover land based their claim on a deed to A., and there was a latent ambiguity in it, it was unnecessary for defendant to plead this ambiguity.—Justice v. Justice, Ky., 124 S. W. 351.

32.——Title to Property.—One who claims title to property, and is in possession of the same, may sue in ejectment.—Gibson v. McGurrin, Utah, 106 Pac. 669.

33. **Elections**—Buying Votes.—An indictment under Acts 1905, p. 111, making it a misdemeanor to buy or sell a vote at a primary election, held not defective because failing to allege that the person whose vote was bought was a registered voter.—Lepinsky v. State, Ga., 66 S. E. 965.

34. **Electricity**—Care Required.—Where the wires of a telephone company and of an electric lighting company were strung on a pole belonging to a telephone company, together with fire and police wires of a city, held that each of the companies were bound to anticipate the use of the telephone pole by the city's employees in inspecting its wires.—Beaming v. South Bend Electric Co., Ind., 90 N. E. 786.

35.——Negligence.—It is the duty of a lighting company carrying electricity by its wires through the streets in dangerous quantities, not only to make the wires safe by proper insulation, but to keep them so by vigilant oversight and repair.—Dow v. Sunset Telephone & Telegraph Co., Cal., 106 Pac. 587.

36. **Eminent Domain**—Consequential Damages.—In assessing consequential damages to abutting property caused by grading a street and constructing a street railway thereon, special benefits accruing to the property must be considered and set off against the damages.—Bragan v. Birmingham Ry., Light & Power Co., Ala., 51 So. 30.

37. **Equity**—Pleading.—An objection that the bill in proceedings for the settlement and dissolution of a partnership contained no averment imputing fraud, bad faith, or culpable negligence to the managing members of a partnership, in consequence of which losses described resulted, is properly asserted by demurrer.—Northern v. Tatum, Ala., 51 So. 17.

38. **Estoppel**—By Deed.—While the husband is estopped to deny recitals in a conveyance to his wife, to which he was a party, his forced heirs are not so estopped.—Succession of Graf, La., 51 So. 115.

39.——Contract.—Where defendant had agreed in writing to sell plaintiff his farm, and subsequently told plaintiff he would secure a loan for him, held that he was not estopped to repudiate this promise by the fact that plaintiff relied upon it, there being no consideration for the promise.—Norris v. Letchworth, Mo., 124 S. W. 559.

40.——Title to Land.—Where a vendor, after contracting to sell land, filed a sworn petition asking the appointment of a guardian for his insane wife, alleging that the property was community property, he cannot afterwards say that the wife had no interest in the property, and insist that the purchaser accept his conveyance as a marketable title.—Colpe v. Lindblom, Wash, 106 Pac. 634.

41. **Evidence**—Attesting Witness.—Where a contract on its face purports to have been executed out of the state, it will be presumed, in the absence of evidence, that the attesting wit-

ness is a nonresident, so as to permit his signature to be proved.—Mobile, J. & K. C. R. Co. v. Hawkins, Ala., 51 So. 37.

42.——Bill of Exceptions.—A bill of exceptions is inadmissible to prove the testimony of a witness on a former trial.—Central of Georgia Ry. Co. v. Carleton, Ala., 51 So. 27.

43.——Common law of Sister State.—In an action by a servant for injuries received in another state, where no statute of that state, relating to the subject is pleaded, it will be presumed that the common law is in force in that state.—Whitfield v. Louisville & N. R. Co., Ga., 66 S. E. 973.

44.——Consideration of Deed.—The words of a deed are open to explanation by parol proof as to the amount, kind, and receipt of consideration.—Shehy v. Cunningham, Ohio, 90 N. E. 805.

45.——Failure of Consideration.—In an action on a note reciting the consideration as "value received," by the original holder, defendant could show that the consideration was personal property as to which the warranties made by the seller have failed.—Pidcock v. J. Crouch & Son, Ga., 66 S. E. 971.

46.——Town Records.—In an action against a town on a debt, records of the town held prima facie evidence of indebtedness in excess of the constitutional limitation.—Leavitt v. Town of Somerville, Me., 75 Atl. 54.

47. **Exchange of Property**—Breach of Warranty.—Where plaintiff traded his mules for a horse falsely represented by defendant to be sound, plainitff could either sue for a breach of warranty or for the return of the mules.—Talbott v. Krahwinkle, Ky., 124 S. W. 323.

48. **Executors and Administrators**—Establishment of Claim.—In a proceeding to recover from distributees on an obligation of decedent to account for personalty held in trust, and to reach property in the hands of distributees to satisfy the claim, the executor or administrator held a necesary party.—Mathewson v. Wakelee, Conn., 75 Atl. 93.

49. **Forgery**—Intent.—If a check was intended to be payable to accused, his indorsement thereof was lawful, though it described him by a different name.—State v. Anderson, Del., 74 Atl. 1097.

50. **Frauds, Statute of**—Letters to Third Person.—Letters and memoranda signed by the party to be charged may be a sufficient memorandum of a contract within the statute of frauds, though not intended for the other party or known to him, if they are otherwise sufficient.—Jacobson v. Hendricks, Conn., 75 Atl. 85.

51.——Letters Written by Party to Be Charged.—Letters written by the party to a sale other than the one to be charged held admissible as part of the memorandum required by the statute of frauds.—Weymouth v. Goodwin, Me., 75 Atl. 61.

52. **Guaranty**—Performance by Creditor.—An offer to guarantee an indebtedness if plaintiff would continue the debtor's account for the next month, held to be obligatory on a promise to the debtor to continue the account.—Lascelles v. Clark, Mass., 90 N. E. 875.

53.——What Constitutes.—A mere request by one to give credit to another does not create a legal liability to pay the debt.—Goldring v. Thompson, Fla., 51 So. 46.

54. **Gifts**—Inter Vivos.—A gift of the donor's check subject to a written memorandum stipulating that the check shall not be payable until after the donor's death, held not a valid gift inter vivos.—Foxworthy v. Adams, Ky., 124 S. W. 381.

55. **Highways**—Duty of Travelers Toward Each Other.—A person with an automobile and a person with a team must each exercise his rights with due regard to the corresponding rights of the other.—Gurney v. Piel, Me., 74 Atl. 1131.

56. **Homestead**—Right of Surviving Husband.—The amount paid by the surviving husband for permanent street improvements in front of the homestead, after the death of the wife, held properly deducted from proceeds of a sale of the premises in determining the amount the only child of the surviving husband and deceased wife is entitled to.—Mattingly v. Kelly, Tex., 124 S. W. 483.

57. **Homicide**—Intent.—The court having submitted, as a predicate for a conviction on a prosecution for murder, a whipping with a belt strap, not a deadly weapon, held, Pen. Code, art. 717, as to considering, on the question of intent, the instrument with which a homicide is committed, should have been given.—Betts v. State, Tex., 124 S. W. 424.

58.——Intent.—The intent to commit murder on a trial for assault with intent to murder may be inferred from proof of the use of a deadly weapon.—State v. Moore, Del., 74 Atl. 1112.

59. **Husband and Wife**—Action for Alienation of Husband's Affection.—An action by a wife for the alienation of her husband's affection, held to accrue at the time the husband and wife separated so that the action was barred in two years.—Farneman v. Farneman, Ind., 90 N. E. 775.

60.——Community Property.—A wife as survivor of the community has no power to transfer community property by deed for the purpose of carrying out an unenforceable contract between her deceased husband and another.—Broocks v. Payne, Tex., 124 S. W. 463.

61.——Earnings of Wife.—Earnings of a married woman derived from caring for the infant children of her deceased cousin under a contract with their father held her separate property.—Elliott v. Atkinson, Ind. 90 N. E. 779.

62.——Gifts Inter Vivos.—A gift of a note by the payee to his wife held not a valid gift inter vivos.—Foxworthy v. Adams, Ky., 124 S. W. 381.

63.——Property Acquired After Marriage.—The law of the domicile controls as to personal property acquired during converture.—Colpe v. Lindbolm, Wash., 106 Pac. 634.

64. **Inn-Keepers**—Fire Escapes.—One, having the time and opportunity to learn of the condition of a lodging house as to fire escapes, by voluntary remaining in the building assumed the danger of any failure to provide adequate escapes.—Radley v. Knepfly, Tex., 124 S. W. 447.

65. **Intoxicating Liquors**—Aiding Maintenance of Liquor Nuisance.—One who aids in maintaining a liquor nuisance may be charged as a principal.—State v. Bartley, Me., 74 Atl. 1129.

66.——Licenses.—Upon application of a corporation for a brewer's license under Act June 9, 1891 (P. L. 257), held that the corporation's

unfitness may be shown by illegal acts of its officers or authorized agents.—In re Indian Brewing Co.'s License, Pa., 75 Atl. 29.

67. **Judgment**—Conclusiveness.—To render a former judgment conclusive on any matter, it must appear that the precise point was in issue and decided.—House Cold Tire Setter Co. v. Ingraham, Conn., 75 Atl. 80.

68.——Findings of Fact.—When the ultimate fact is found, the judgment rests on it, and not on the probative facts.—Sierra Nevada Lumber Co. v. McCormick, Utah, 106 Pac. 666.

69.——Setting Aside Default.—A default judgment may not be set aside where no affidavit of merits is filed.—Pearce v. Butte Electric Ry. Co., Mont., 106 Pac. 563.

70. **Life Insurance**—Misrepresentations.—Provision of policy that, if age has been misstated, the benefits will be equitably adjusted, and that, after two years the policy will be incontestable, are both effective.—Mutual Life Ins. Co. of New York v. New, La., 51 So. 61.

71.——Time for Suing.—Where an insurer with prompt notice of loss denies all liability, he cannot complain that insured did not observe the provision requiring him to wait 60 days after proof of loss before suing.—Phoenix Ins. Co. of Hartford v. Flowers, Ky., 124 S. W. 403.

72.——Waiver of Lapse.—A provision in a life policy and in a premium note, that the policy should lapse by failure of insured to pay the note, being wholly for the insurer's benefit, is one which it may waive, and such waiver may be express or by such conduct as evinces the purpose not to enforce it.—New York Life Ins. Co. v. Evans, Ky., 124 S. W. 376.

73. **Life Estate**—Enhancement in Value.—The enhancement in the value of corporate stock while in the hands of the life tenant, with gift over, belongs to the remainderman.—Bains v. Globe Bank & Trust Co., Ky., 124 S. W., 343.

74.——Title of Remainderman.—The title of remainderman cannot be destroyed by any act of the life tenant.—Hall v. Condon, Ala., 51 So. 20.

75. **Limitation of Actions**—Mistake.—The statute of limitation began to run against the right of a county to surcharge a sheriff's tax collection settlement when a mistake therein was discoverable by the exercise of reasonable diligence.—Alexander v. Owen County, Ky., 124 S. W. 386.

76.——Notes Payable on Demand.—A note payable on demand is barred in six years after its date.—Brooklyn Bank v. Barnaby, N. Y., 90 N. E. 834.

77.——Part Payment.—Payments by one indebted for board held to stop the running of limitations and to create a new period for limitations.—Brown's Adm'r v. Osborne, Ky., 124 S. W. 405.

78. **Logs and Logging**—Right to Remove Timber.—A deed to standing timber providing for removal within three years held to limit the grantee's right to timber actually removed within the time specified.—Allen & Nelson Mill Co. v. Vaughn, Wash., 106 Pac. 622.

79. **Malicious Prosecution**—Defenses.—It cannot be presumed that a magistrate was a practicing lawyer, so as to constitute a defense to an action for malicious prosecution.—Stephens v. Gravit, Ky., 124 S. W. 414.

80. **Master and Servant**—Guards for Machinery.—If a servant does not require further safeguards to machinery, and so takes the chance of injury, he cannot recover for an injury therefrom.—Wiley v. Batchelder, Me., 75 Atl. 47.

81.——Injury to Servant.—Trainmen may presume that flagmen and other employees on or near the track will keep out of danger, and the railroad is not liable for an injury to them unless the trainmen have good reason to believe that the employees will not keep out of danger, and then fail to use proper means at their command.—Wilkerson v. St. Louis & S. F. R. Co., Mo., 124 S. W. 543.

82. **Mechanics Liens**—Persons Entitled to Lien.—Laws 1905, p. 137, c. 72, giving a lien to blacksmiths, wagon makers, machinists, boiler makers, etc., does not include plumbers, painters, plasterers, and like artisans.—Modern Plumbing & Heating Co. v. American Soda Fountain Co., Wash., 106 Pac. 628.

83. **Mines and Minerals**—Conveyance and Contracts.—A covenant to convey the mineral in a part of certain lands of a party, together with all necessary mining rights, included a conveyance of such easements in the balance of the land as were necessary to accomplish the mining and removal of the material.—Neal v. Finley, Ky., 124 S. W. 348.

84. **Municipal Corporations**—Acceptance of Bids.—Where a city ordinance was passed authorizing a street improvement, and plaintiff submitted a bid for the work, an acceptance thereof by resolution providing that the work be completed within 30 days held not to inject a new condition into the contract, so as to render the acceptance incomplete.—Platte City v. Paxton, Mo., 124 S. W. 531.

85.——Illegal Payment of Claim.—Where a claim against a town is allowed and paid in violation of an express statute, it is no defense to a suit to recover the money that the parties acted in good faith.—Campbell v. Brackett, Ind., 90 N. E. 777.

86.——Liability for Acts of Officers.—An incorporated town is not liable for the acts of its mayor and marshal in enforcing, without malice, an illegal ordinance by imprisoning one violating it.—Franks v. Town of Holly Grove, Ark., 124 S. W. 514.

87.——Ordinance as to Fire Escapes.—An ordinance requiring the third story of a building to be constructed as stated, in order to provide escapes from fires, held unreasonable and void.—Radley v. Knepfly, Tex., 124 S. W. 447.

88.——Proximate Cause.—It is not necessary to make one liable for negligent injuries that he should have anticipated the particular accident if conditions were negligently permitted to exist or continue from which it might reasonably have been anticipated.—Beaming v. South Bend Electric Co., Ind., 90 N. E. 786.

89. **Negligence**—Place Attractive to Children.—A telephone company in possession of a vacant lot as a licensee, while constructing a telephone line across it, held to owe no duty to children trespassing thereon, except not to injure them wantonly.—Hall v. Missouri & Kansas Telephone Co., Mo., 124 S. W. 557.

90. **Navigable Waters**—Rights of Public.—The public has not such an unqualified right to a stream navigable for floatage only for a part of the year as in those navigable for all purposes, and such right cannot be exercised so as to prevent the utilization of the water power, or such other reasonable uses as the public may make.—Blackman v. Mauldin, Ala., 51 So. 23.

91.——Riparian Rights.—The damming of a stream, navigable a portion of the year to create artificial freshets for floating logs, may be restrained.—Flinn v. Vaughn, Ore., 106 Pac. 642.

92. **Nuisance**—Noise and Smoke.—It is not necessary that the health of plaintiff or any member of his household should have been impaired to entitle him to restrain a nuisance caused by noise and smoke from a gas factory.—Judson v. Los Angeles Suburban Gas Co., Cal., 106 Pac. 581.

93. **Officers**—Officers Defacto.—In controversies to which he is not a party, the title to his office of an officer de facto and his acts therein cannot be questioned.—Stuart v. Inhabitants of Ellsworth, Me., 75 Atl. 59.

94.——Salaries.—Legislation affecting the compensation of an officer will not be presumed as intended to apply to an incumbent, unless the legislature expressly so declares.—Crocket v. Mathews, Cal., 106 Pac. 575.

95. **Partnership**—Expenses and Losses.—Where the articles of partnership do not otherwise provide, the expenses and losses of a partnership are to be borne by all the members in the proportion they share in the profits; and losses occasioned by conduct or omission of a managing partner will not be charged against him, unless he has been guilty of fraud, bad faith or culpable negligence.—Northen v. Tatum, Ala., 51 So. 17.

96. **Partition**—Pleading.—The meaning of and persons included by the phrase in a deed to a person for life with remainder to "her children," under which complainants claim as tenants in

common in remainder after the death of the life tenant, cannot be determined by a demurrer to the bill for partition.—Hall v. Condon, Ala., 51 So. 20.

97. **Perpetuities**—Power.—An appointment exercised under a will authorizing the appointment as devisees of the residue of testator's estate such of his legal heirs at his wife's death as she might designate in her will, held not to contravene the statute against perpetuities.—Heald v. Briggs, Conn., 74 Atl. 1123.

98. **Principal and Agent**—Payment to Agent.—Where money has been paid to an agent for his principal, and is recoverable back from the principal, the agent is liable until he has paid over the money to his principal.—Pancoast v. Dinsmore, Me., 75 Atl. 43.

99. **Process**—Amendments.—Voidable process is amendable, but void process is not.—Roy v. Phelps, Vt., 75 Atl. 13.

100. **Quieting Title**—Evidence of Possession.—On proof of legal title by plaintiff in an action to quiet title, it will be presumed, in the absence of evidence to the contrary, that he was entitled to the actual possession.—Gibson v. McGurren, Utah, 106 Pac. 669.

101. **Railroads**—Duty to Public.—A railroad exercising a franchise to operate steam locomotives across a street cannot shift the responsibility for the exercise of such right to an agent, who, by its authority, actually exercises it.—Black v. Rock Island, A. & L. R. Co., La., 51 So. 82.

102.——Injury to Intoxicated Passenger.—The fact that a passenger had by voluntary intoxication incapacitated himself from exercising ordinary care held not to excuse the conductor for forcing him from a place of safety to one where it would require extraordinary care to avoid injury.—Central of Georgia Ry. Co. v. Carleton, Ala., 51 So. 27.

103. Ejection of Passenger.—One who refuses to pay his fare may be ejected, though he afterwards offers to pay his fare when the train is stopped to eject him.—Freeman v. Costley, Tex., 124 S. W. 458.

104. **Removal of Causes**—Diversity of Citizenship.—A suit by a state to collect taxes on property omitted from taxation is not removable to the federal court under U. S. Comp. St. 1901, p. 509; there being no diversity of citizenship.—Darnell v. State, Ind., 90 N. E. 769.

105. **Reward**—Return of Escaped Convict.—Under Ky. St., sec. 1936, providing a reward for the capture and return of an escaped convict a party was entitled to a reward although the convict, because of injuries had abandoned the idea of escape, and asked him to return her to the prison.—Mudd v. Woodside, Ky., 124 S. W. 321.

106. **Sales**—Construction of Contract.—The words "net to us," in a telegram sent by plaintiffs offering to sell butter to defendant for 17 cents per pound "net to us," meant that the price was to be 17 cents free from all charges and deductions.—Floral Creamery Co. v. Dillon & Douglass, Conn., 75 Atl. 82.

107.——Recovery of Goods by Seller.—One selling an article, title to remain in him till paid for, held entitled to maintain replevin therefor on default of payment.—Kerl v. Smith, Miss., 51 So. 3.

108. **Set-Off and Counterclaim** — Assigned Claims.—In an action by a consignor of produce against the consignee, on his own claim and others assigned to him, held that defendant was entitled to deduct, as against the entire mass, for unmarketable produce not identified as belonging to any particular consignor.—Kempe v. Johnson, Wash., 106 Pac. 619.

109.——Construction of Statute.—Statutes of set-off are favored in law, and reasonable regard must be given to the spirit of the statute.—Stewart v. Knight, Vt., 75 Atl. 12.

110.——Equitable Set-Off.—A party sued for goods sold by a non-resident having no property in the state and no agent upon whom service could be made may set up as an equitable set-off the breach of another contract with plaintiff for the purchase of other goods.—Ewing Merkel Electric Co. v. Lewisville Light & Water Co., Ark., 124 S. W. 509.

111. **Specific Performance**—Necessity of Tender.—Where a party covenanted to convey the mineral in certain lands on payment of a certain sum, his refusal to convey on demand was a waiver of tender by the purchaser giving him an immediate action for specific performance.—Neal v. Finley, Ky., 124 S. W. 348.

112.——Oral Contract for Sale of Land.—An oral contract of sale of an interest in land will not support an action for specific performance.—King v. Upper, Wash., 106 Pac. 612.

113. **Taxation**—Creditor's Bill.—A creditor's bill may be broubht to collect a tax.—Darnell v. State, Ind., 90 N. E. 769.

114. **Telegraphs and Telephones**—Delay in Delivery of Messages.—The validity of a stipulation, in a contract made in a sister state for the transmission of a message, held determined by the law of the forum as a stipulation affecting the remedy.—Western Union Telegraph Co. v. Douglass, Tex., 124 S. W. 488.

115. **Trial**—Conflict Between Special Answer and General Verdict.—It is only when the conflict between a special answer and the general verdict is beyond the possibility of reconcilement by any evidence admissible under the issues that the general verdict will fail.—Union Traction Co. of Indiana v. Howard, Ind., 90 N. E. 764.

116.——Reception of Evidence.—The court can of its own motion confine the testimony within legal bounds.—Bragan v. Birmingham Ry., Light & Power Co., Ala., 51 So. 30.

117. **Vendor and Purchaser**—Burden of Proof.—In an action between adjoining lot owners to recover a strip claimed as a part of plaintiff's lot, held, that the burden was upon defendants to show fraud or mistake in the description in their deed, and that plaintiff had notice thereof on purchasing.—Beavers v. Baker, Tex., 124 S. W. 450.

118.——Performance of Contract.—Where defendant contracted with plaintiff to sell him his farm, agreeing to deliver the deed on the payment of the purchase price, the obligation was on plaintiff to pay or tender to defendant the purchase money on the date fixed by the contract, in order to put defendant in default.—Norris v. Letchworth, Mo., 124 S. W. 559.

119.——Time for Conveyance.—Though time is not made the essence of a contract for the sale of land, the vendor is bound to convey within a reasonable time.—Colpe v. Lindblom, Wash., 106 Pac. 634.

120. **Venue**—Plea of Privilege.—Defendant cannot, in a plea of privilege, seeking to change the venue, present an issue of fraudulent assignment of the claim in suit, without specially charging that the claim was fraudulently assigned for the purpose of conferring jurisdiction.—Pearce v. Wallis, Landes & Co., Tex., 124 S. W. 496.

121. **Water and Water Courses**—Obstruction.—Where the obstruction causing land to be overflowed is permanent in character, so that the damages are in gross, and there can be but one recovery, such damages are recoverable by the then owner of the land, and not by a successor in title.—City of Richmond v. Gentry, Ky., 124 S. W. 337.

122. **Wills**—Burden of Proving Testamentary Capacity.—In proceedings for the probate of a will, contested on the ground of testamentary incapacity, petitioner has the burden of proving sanity; but until evidence to the contrary is produced the presumption of sanity sustains the burden of proof.—Clifford v. Taylor, Mass., 90 N. E. 862.

123.——Legacy to Executor.—A legacy to an executor in lieu of commissions should be deducted before distribution to the widow, who has waived the provisions of the will.—In re Fogg's Estate, Me., 74 Atl. 1133.

124.——Testamentary Capacity.—To constitute testamentary capacity, testator need not know the exact extent and value of his property.—Friedersdorf v. Lacy, Ind., 90 N. E. 766.

125. **Witnesses**—Examination.—A witness who is competent may testify without being specially interrogated.—Mobile, J. & K. C. R. Co. v. Hawkins, Ala., 51 So. 37.